

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2002-395-E - ORDER NO. 2003-535

AUGUST 29, 2003

IN RE:	Application of Carolina Power & Light	)	ORDER GRANTING
	Company for a Certificate of Environmental	)	REHEARING AND
	Compatibility and Public Convenience and	)	CLARIFICATION
	Necessity for the Construction and Operation	)	
	of a new 230-kV Transmission Line from its	)	
	Darlington County Generating Plant	)	
	Switchyard near Hartsville, South Carolina to	)	
	its Florence 230-kV Substation near Florence,	)	
	South Carolina.	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Reconsideration of Order No. 2003-373 filed by Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. (CP&L or the Company). CP&L has also filed a Motion to Correct Errors of Law. Responses to both of these documents were received from counsel for the Intervenor Robert James and Ellen James Ramsburgh (the Intervenor). We will construe the Petition for Reconsideration as a Petition for Rehearing and grant said rehearing, as explained below.

CP&L petitioned this Commission to reconsider Order No. 2003-373 on the grounds that: (1) the cost estimates upon which the Commission relied in making its decision were preliminary estimates, not based upon detailed evaluations of the property in question, but instead assumed a generic, average right-of-way acquisition price would apply without the need for condemnation (the cost estimates were provided in late-filed Hearing Exhibit No. 4); (2) potential condemnation costs associated with the route

selected by the Commission will increase the cost of the Commission approved route; (3) the Commission placed too much emphasis upon the alleged impact of the proposed line on the “green way” along Highway 52; and (4) the Bethea Home has agreed to allow CP&L to locate the line on its property, which will allow CP&L to avoid the property of the Intervenor. CP&L also notes that a number of property owners are threatening litigation and/or a class action lawsuit over the approved route. CP&L concludes that the originally proposed “B25” portion of the route should be substituted for the approved “B28” portion.

The Intervenor filed opposition to the reconsideration, and argue that the reasons presented by CP&L do not constitute sufficient grounds for a Commission reversal of its decision vis a vis B28 and B25. Also, the Intervenor state that if the Commission was to decide the contrary, the remedy under South Carolina law would be to order a rehearing of the matter, not the selection of B25 as CP&L contends. Specifically, the Intervenor argue that although CP&L alleges that it has now done cost estimates that, contrary to earlier ones show that the alternative route is more costly than the preferred route, CP&L has not provided the detailed analysis to judge the accuracy of its claims. Further, the Intervenor argue that the little information that CP&L does provide indicates that its unsupported conclusions are erroneous. Further, the Intervenor state that selecting the preferred alternative now based on costs, even in the face of our findings that it is not environmentally justified, would constitute reversible legal error.

In addition, the Intervenor note that CP&L’s argument that this Commission gave too much weight to the impact of the preferred route on the “green way” is

unavailing. CP&L argues, according to the Intervenors, that there are visually adverse impacts already in the vicinity of the James home and farm and the “green way.” According to the Intervenors, the Commission correctly rejected these arguments, since the lack of a firm guarantee that a particular environment will be maintained is not justification for not trying to lessen the impact of the transmission lines on it.

Next, the Intervenors argue that this Commission should not find any merit in CP&L’s ability to obtain permission from the Bethea Baptist Home to run the transmission line along its property and thereby avoid crossing the James farm. Basically, this variation would physically avoid crossing the James farm, but, according to the Intervenors, it would still adversely affect the aesthetics of the house and farm, though that effect would be lessened.

Further, the Intervenors state that alleged threatened lawsuits are not a valid ground for changing the Commission’s decision, since such lawsuits are not included either in the Commission’s statutory or regulatory authority as criteria upon which it may base its decision on an application for a Certificate of Environmental Compatibility and Public Convenience and Necessity. Therefore, basing a decision on such lawsuits would be reversible error for this Commission, according to the Intervenors.

Finally, the Intervenors argue that the remedy in this matter, if the Commission finds in favor of CP&L is to order a rehearing, not to order the preferred route. Because of all the arguments it made, the Intervenors state a belief that CP&L’s Petition should be denied.

In our August 5, 2003, agenda session, we determined that the CP&L Petition for Rehearing should be treated as a Petition for Rehearing, and that rehearing should be granted in this matter. We stated in that agenda session and hold in this Order that the issues raised in CP&L's Petition are issues that could affect the public interest and should be considered fully. We further expressed the opinion at that time and hold at this time that such full consideration can only be had by a rehearing where the parties can present the issues to the Commission. We would state parenthetically that this holding is not to be taken for precedent that all Petitions for Reconsideration will, from now on, be interpreted by this Commission as Petitions for Rehearing. We believe that the unusual circumstances contained in the case at bar, including their public interest nature, mandate a rehearing. Obviously, we cannot say with any certainty that the same circumstances would exist in every case where a Petition for Reconsideration is filed, that that Petition for Reconsideration would automatically be converted to a Petition for Rehearing. We will therefore examine each matter on a case by case basis, and hold that if a party submits a document delineated as a "Petition for Reconsideration," we will examine it as a Petition for Reconsideration unless we are compelled to do otherwise by considerations of public interest, such as in the case at bar.

We would note that CP&L alleged in its Petition for Reconsideration that the cost estimates upon which this Commission made its decision were preliminary estimates, assuming that a generic, average right-of-way acquisition price would apply without the need for condemnation. As pointed out by the Intervenors, CP&L has not provided the detailed analysis to judge the accuracy of its claims. We believe that, since the cost of the

various routes is an issue that goes to the core of our determinations in this matter, a rehearing is the most appropriate methodology to finally make that determination. Further, CP&L alleged in its Petition that potential condemnation costs associated with the route selected by the Commission will increase the cost of the Commission-approved route. Again, there is no evidence in the record at this time concerning condemnation costs. Since one of our purposes in this proceeding is to get to an analysis of the actual cost of the various routes, we hold that, for practical purposes, a rehearing is the proper methodology to make the determinations.

CP&L further alleges that we placed too much emphasis upon the alleged impact of the proposed line on the “green way” along Highway 52, and that the Bethea Home has now agreed to allow CP&L to locate the line on its property, which will allow CP&L to avoid the property of the Intervenors. We would state that we agree that the effect of the proposed line on the “green way” along Highway 52 bears another look. Further, at the time of the hearing, we had no evidence that the Bethea Home had agreed to have the line in question run across its property, although it was alleged that the Bethea Home would do so. Accordingly, these issues point to the need for a rehearing. We take no position at this time as to whether or not threatened lawsuits should have any bearing on our decision. We think that the public interest requires a rehearing in this matter as noted above. At the time of the Commission discussion, we determined that the rehearing should involve a rehearing on the entire case. We have since reexamined this conclusion.

Subsequent to our agenda session of August 5, 2003, CP&L filed a Motion to Correct Errors of Law. The grounds for the Motion were that, according to CP&L, the

decision to convert the Petition for Reconsideration into a Petition for Rehearing was erroneous, as was our decision at that time to call for a rehearing of the entire case. The Company stated in its Motion that it could not find any precedent for treating a Petition for Reconsideration as a Petition for Rehearing. Second, with regard to the issue of this Commission rehearing the entire case versus part of it, the Company cites S.C. Code Ann. Section 58-27-2150, which provides in part as follows:

After an order or decision has been made by the Commission any party to the proceedings may within ten days after service of notice of the entry of the order or decision apply for a rehearing **in respect to any matter determined in such proceedings as specified in the application for rehearing**, and the Commission may, in case it appears to be proper, grant and hold such rehearing.

CP&L therefore states that the wording of the statute provides that a rehearing should be limited to the matters raised by the applicant for the rehearing. CP&L further states its preference for this Commission to treat CP&L's Petition for Reconsideration as a Petition for Reconsideration. We have already rejected that principle. In the alternative, CP&L states that if the Commission continues to treat the Petition as a Petition for Rehearing, then the rehearing should be limited to those matters raised by CP&L in its Petition for Reconsideration. We agree. We believe that the matters raised in CP&L's Petition for Reconsideration should determine the scope of our rehearing, as illustrated in S.C. Code Ann. Section 58-27-2150.

CP&L also discusses in its Motion several issues. The first is the Company advisement that the Bethea Home has agreed to allow CP&L to locate the proposed transmission line on its property, which will allow CP&L to entirely avoid the property of the James farm. Second, CP&L requested that this Commission take judicial notice of the

vista of the stretch of Highway 52 that Intervenor Robert James asserts is a “green way.” Finally, CP&L advised the Commission that the cost estimates in Late Filed Exhibit No. 4 were incorrect, with more precise numbers indicating that the cost of Route B28 exceeded the cost of B25, and that condemnation costs associated with Route B28 would further increase its costs. CP&L asserts that none of these constitute new evidence. As we have stated, we do disagree with these assertions, and we believe that a rehearing is needed to further delve into this information.

CP&L notes that, with regard to the Bethea Home, CP&L witness Steve Wilson testified in his rebuttal testimony that CP&L was in discussions with the Bethea Home, and that while CP&L had not at that time received final approval from the Bethea Home to locate the line on their property, CP&L expected to receive such approval, and that by locating the line on the property of the Bethea Home, CP&L could entirely avoid the property of Robert James. In the CP&L Petition for Reconsideration, CP&L advised the Commission that such approval has been obtained. CP&L alleges that no new hearing is needed on this matter.

With regard to the Commission taking judicial notice of the appearance of the alleged “green way” along Highway 52, the Company notes that Commission Regulation 103-870 (C) provides that the Commission may take notice of judicially cognizable facts. The Company also cites the South Carolina Rules of Evidence and the case law. Generally, according to the Company, judicial notice is appropriate if the accuracy of the fact in question can be determined by reference to readily available sources of indisputable reliability. The Company asserts that this is true about the structures and

buildings along Highway 52. Accordingly, the Company states its belief that no hearing is necessary to address this issue.

CP&L discusses the cost issue, and notes that it did not offer Late Filed Exhibit 4 into evidence, but that the exhibit was requested by a Commissioner, filed after the close of the hearing and is not evidence in this proceeding. According to the Company, CP&L explained during the hearing and in the transmittal letter accompanying the exhibit that CP&L did not have accurate information on the costs of the various line segments and would not have accurate information until the route had actually been engineered and the number and types of structures needed to build the line selected. CP&L further explained, according to their Motion, during the hearing that cost was implicitly considered in several of the factors evaluated in the routing process. The factors were: the length of the line, the number of acres impacted, the number of heavy angles, and the amount of woodlands and wetlands crossed. CP&L cites Commission Regulation 103-870 for the proposition that the rules of evidence applied in civil cases in the Court of Common Pleas shall be followed in Commission proceedings. The Company then cites Rule 901 of the South Carolina Rules of Evidence for the principle that information such as Late Filed Exhibit No. 4 must be properly authenticated before being allowed into evidence. CP&L notes that this was not done with Exhibit No. 4, since no witness sponsored this exhibit nor vouched for its integrity. CP&L states that Late Filed Hearing Exhibit No. 4 should not have been relied upon by the Commission, and was not properly admitted into evidence. CP&L states, however, that since it was relied upon by the Commission in Order No. 2003-373, the Company conducted a more detailed analysis of the costs



associated with routes B25 and B28 and provided that information to the Commission in CP&L's Petition for Reconsideration. The implication is that no new hearing is needed on this information, since the Company states that neither of these two cost estimates should have been relied upon, but that the Commission should have only relied on the evidence presented during the hearing. CP&L states that when this is done, and the Commission considers the fact that the Bethea Home route will avoid the James Farm, and that, in CP&L's words, "there is no green way along Highway 52 at the location in question, Route B25 is the appropriate route."

Finally, CP&L notes that the statement was made during the agenda conference that CP&L had already acquired the right-of-way from all but one of the landowners associated with Route B25. The Company denies this, but states that of all the landowners located along the entire proposed route, only one had intervened.

In summary, CP&L asks that its Petition for Reconsideration be treated as such; however, if a rehearing is required, then it should be limited to the issues raised by CP&L in its Petition for Reconsideration. Further, CP&L asks that Late Filed Hearing Exhibit No. 4 not be considered as part of the evidence in this case.

The Intervenor filed a response to the Company's Motion to Correct Errors of Law. First, the Intervenor again assert that the Commission is required to either deny CP&L's Petition or order a rehearing by law, based on S.C. Code Ann. Section 58-27-2150. With regard to the Bethea Home point, the Intervenor argue that running the line through the Home's property would still affect the aesthetics of the James Farm, though to a lesser degree than if the line ran through the Farm. Further, the Intervenor note that

the Company made the same arguments about the “green way” as it did during the hearing.

According to the Intervenor, the only new information that CP&L presents in its Petition for Reconsideration is its assertion that more detailed evaluations show that, contrary to previous submittals, the preferred route is less expensive than the alternative route. The Intervenor asserts that the Company has offered no real data to support this conclusion. Further, the Intervenor points out that the Commission’s decision in this matter was that the preferred route was found by the Commission in its decision not to be environmentally justified. Accordingly, according to the Intervenor, this means that, regardless of cost, the alternative route should be chosen.

The Intervenor demands that the Commission rule on the Petition for Reconsideration, and deny it, without further need for a hearing. If, however, the Commission rules in favor of the Company, it must require a rehearing, according to the Intervenor. Further, if the Commission grants rehearing, the Intervenor recommends limiting that rehearing to the issues raised in CP&L’s Petition for Reconsideration, or allow any information relevant to the Application for a Certificate of Environmental Compatibility and Public Convenience and Necessity. According to the Intervenor, there are no grounds for changing the route required by the Commission in its original decision.

We have considered these matters and the pleadings filed on behalf of the parties. We conclude that, as stated before, we will continue to construe CP&L’s Petition for Reconsideration as a Petition for Rehearing. Despite CP&L’s assertions to the contrary,

new allegations have been raised by the parties, and this Commission should consider them relevant to the determination of the issues in this matter. However, again, we stop short of ruling that every Petition for Reconsideration filed with this Commission shall be construed as a Petition for Rehearing. We would note that Commission Regulation 103-836 allows the submission of a Petition for Reconsideration or Rehearing. However, once again, we believe that the public interest mandates our construing the Petition for Reconsideration filed by CP&L as a Petition for Rehearing in this particular case. Parties in other cases should not construe this action as precedential.

The Rehearing in this case shall be limited to the issues raised by CP&L in its Petition for Reconsideration, according to S.C. Code Ann. Section 58-27-2150. These issues are as follows: (1) the alleged agreement with the Bethea Home to bypass the James farm as a modification of Route B25; (2) the nature of the so-called “green way” along Highway 52; (3) the environmental impacts associated with Routes B25, B28, and B25 as it might become modified by any contract or agreement entered into by the Bethea Home and CP&L; and (4) cost estimate issues as contained in CP&L’s Petition of July 22, 2003, which is that for reconsideration relating to routes B25, B28, and B25 as might become modified by a contract or agreement entered into by the Bethea Home and CP&L.

We also hold that Late Filed Hearing Exhibit No. 4 is part of the evidence of the case because it was identified as a Hearing Exhibit, and admitted as such over the objection of CP&L. See TR. 162-168.

In addition, and contrary to the assertions of CP&L, we will not take judicial notice of the "green way," at this time; however, a site visit may be possible. Intervenor James has also indicated a desire for a public hearing provided for in the context of the Commission rehearing. Should Intervenor James petition the Commission for some sort of public hearing in our usual fashion of night hearings within the context of the rehearing, he is free to do so.

In summary, the Petition for Reconsideration of CP&L is hereby construed as a Petition for Rehearing, and is granted in the manner described above. Prefiling dates for testimony and exhibits and a hearing date for the rehearing shall be set by separate Commission Order. The parties shall be afforded at least thirty (30) days notice of the hearing.

This Order shall remain in full force and effect until further Order of the Commission.

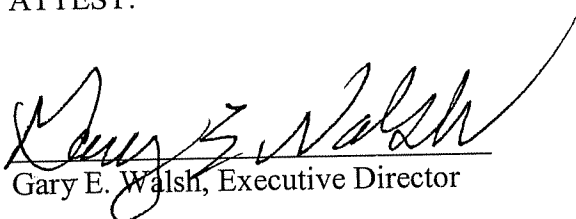
BY ORDER OF THE COMMISSION:



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Mignon L. Clyburn, Chairman

ATTEST:

  
Gary E. Walsh, Executive Director

(SEAL)